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In The
Supreme Court of the United States

ELK GROVE UNIFIED SCHOOL DISTRICT
AND DAVID GORDON,

Petitioners,

v.

MICHAEL A. NEWDOW,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL LAWYERS ASSOCIATION FOUNDATION IN SUPPORT OF PETITIONERS

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Acknowledgment

Counsel of Record acknowledges the assistance in preparing this *Amicus Curiae* Brief of Mrs. Crystal Lynn Crowder, J.D., University of Missouri-Kansas City, and Legal Assistant Joanne M. Gamm.

INTEREST OF *AMICUS CURIAE*[1]

The Foundation represents the interests of lawyers nationwide. Lawyers constitute the members of the judiciary and are well represented in this nation's legislative bodies. The Foundation is "dedicated to the principal that the Founding Fathers of the government of the United States of America established a government structure for the Nation consisting of the Declaration of Independence and the Constitution; that the Constitution is to be interpreted in the light of the principles and transcendent truths set forth in the Declaration of Independence; and the legal community has a special responsibility to preserve and protect that structure." (National Lawyers Association http://www.nla.org/library/conv9803/address_of_robert_cannada.html.)

The Foundation's interest in this case stems from its dedication to those enunciated principles and its focus on educating school children regarding the laws of our country. Most recently, the Foundation produced and distributed an educational video on the Declaration of Independence. The Foundation is dedicated to ensuring that the First Amendment is interpreted properly.

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[1] The parties have consented to the filing of this brief.

Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

SUMMARY OF ARGUMENT

Amicus National Lawyers Association Foundation requests that the Court reverse the decision of the United States Court of Appeals for the Ninth Circuit that the words "under God" in the Pledge of Allegiance violate the Establishment Clause of the First Amendment. In making its decision, a panel of that Court considered the First Amendment in a cramped and shortsighted manner. The panel failed to consider the First Amendment in light of this country's organic laws.

The organic laws of the United States include the Declaration of Independence, which is our nation's charter, and the Constitution as a whole, not merely in part. By looking at all of the organic law, we can glean the nation's philosophy pertaining to God. That philosophy encompasses the concept of theism and the concept of religion. The Declaration of Independence sets forth a theistic *philosophy* for the government. The First Amendment to the Constitution deals with religion. There is no conflict between the Declaration and the Constitution. The Constitution does not require the American government to deny the existence of God. Congress may express our country's theistic philosophy in the Pledge of Allegiance. A public school district may have its teachers lead the Pledge of Allegiance. Nothing is required of the students, including Dr. Newdow's daughter. If Dr. Newdow is offended by the philosophy of this nation, he is welcome to try to change it through the democratic process. The courts are not the place to rewrite that philosophy.

ARGUMENT

The United States was created by a body of organic law. That body includes the Declaration of Independence and the Constitution as a whole. Our organic law adheres to a theistic philosophy of law. Viewed in light of this theistic philosophy of law, the First Amendment does not deny any public school the ability to recognize and honor the existence of God.

A panel of the United States Court of Appeals for the Ninth Circuit has held that the words "under God" in the Pledge of Allegiance violate the Establishment Clause of the First Amendment. *Newdow v. U.S. Congress*, 328 F.3d 466, 490 (9th Cir. 2003). Judge Goodwin, writing for the two judge majority of the panel, erroneously held that espousing the belief that the United States is "a nation under God is a profession of a religious belief, namely, a belief in monotheism." *Newdow*, 328 F.3d at 487. Further, he wrote that the words "under god" are not merely "acknowledgment that many Americans believe in a deity. Nor is it merely descriptive of the undeniable historical significance of religion. Rather, the phrase, 'one nation under God' in the context of the Pledge is normative . . . is identical, for Establishment Clause purposes to a profession that we are a nation 'under Jesus,' a nation 'under Vishnu,' a nation 'under Zeus,' or a nation 'under no god'." *Id.*

The panel held that the Establishment Clause prohibits such attempts to "inculcate in students a respect for the ideals set forth in the Pledge, including the religious values it incorporates." *Id.* This opinion rests on the

conclusion that recognition and honoring of "the existence and moral authority of God" constitutes a religion within the meaning of the First Amendment to the Constitution. The opinion of the panel is wrong in this assumption. When this assumption is refuted, there is no basis for the conclusion reached in the panel's opinion.

The panel did *not* classify atheism as a religion. It did, however, classify theism, the belief in the existence and moral authority of God, as a religion. The truth is that both of these concepts represent a *philosophy* or world view, and neither can be properly classified as a religion.

A. The United States is a republic and as such adheres to a theistic philosophy.

Every government has a governmental philosophy (or world view or life view) of some kind pertaining to God. The government of the United States of America is no exception. The Court of Appeals has erred in not giving consideration to the principles of the Declaration of Independence or the provisions of the Constitution, other than the Establishment Clause, which enunciate the philosophy of the government of the United States of America pertaining to God.

The proper way to determine this governmental philosophy is to examine the documents creating the nation and organizing its government. If the language in these documents is clear, then there is no need to go outside of the documents to determine their meaning. The language of these two documents, the Declaration and Constitution, are absolutely clear – the governmental philosophy of the government of the United States of America is theistic.

B. Every government has a "philosophy" of some kind pertaining to God and, ordinarily, that philosophy of a government will fall into one of four categories.

First, there are governments with organic laws or foundational documents that do not recognize the existence of such things as transcendent truths or morals. Thus the officeholders in such a government have no transcendent truths to guide and direct them in the performance of their government duties. The governmental philosophy is determined by the officeholders without the benefit of guidelines from transcendent morals. Such a government could be a pure democracy, a socialist regime, a monarchy, or some other form of government. This government would be based upon the intellect of humans and would not recognize or accept any transcendent moral principles of any kind. There is no moral limitation on the powers of the government. The government is simply not to address the subject of a Higher Power. The government is to neither acknowledge the existence of God nor deny the existence of God. The wisdom of man is to serve as the foundation of the government. The philosophy of governments of this kind is *agnostic* – that is, the government neither acknowledges nor denies the existence of God. Thus, the government is not permitted to acknowledge and honor the existence of God or God's moral laws .

It appears from its opinion that the panel of the Ninth Circuit is holding that this is the philosophy of the government of the United States pertaining to God: the United States of America has an agnostic government.

Second, there are governments that have a philosophy based upon a particular religion. Such governments recognize and honor a specified religion and the God or gods of that particular religion. In such a government, the moral truths and principles of the favored religion are recognized and honored by the government. The government promotes that particular religion to the exclusion and at the expense of other religions. The form of government may differ.

Both the Declaration of Independence and the Constitution, particularly the First Amendment, make it clear that this is not the philosophy of the government of the United States of America.

Third, governments can also have a philosophy as represented by the concept of God embodied in the concept of atheism. That is, governments may have a philosophy that denies the existence of God, *id est*, the philosophy of atheism. The denial of the existence of God is represented primarily by the Communist form of government.

This is clearly not the philosophy of the government of the United States of America based upon the language of the Declaration and the Constitution.

Finally, governments can also have a philosophy that addresses the concept of God as represented by the concept of theism. That is, governments may have a philosophy that acknowledges and honors the existence of God and the moral laws of God. The form of government with a theistic philosophy is represented primarily by the republican form of government.

This is the philosophy set forth in the Declaration of Independence and implemented by the Constitution.

C. The Founding Fathers made theism the philosophy of our government.

The Founding Fathers did not desire a government based on the "wisdom of man", that is, agnostic. Neither did they want a government based on a particular religion. They were well-educated and familiar with the history of philosophy. They believed that government should have a theistic basis. They thereby rejected the philosophy of atheism as the governmental philosophy for the United States. They set forth in the Declaration of Independence a governmental philosophy based on the concept of theism, that is, the recognition and honoring of the Creator God and His moral laws. The Declaration of Independence established a nation with a government that acknowledges and honors the existence of a personal God as Creator and Supreme Ruler of the Universe, who transcends His creation and works in and through His creation in revealing His transcendent moral laws to man. This is much more than the simple acknowledging of and honoring the existence of God. It contemplates a personal God to whom all officeholders in the government can have access regardless of their particular religion or lack of a particular religion. Under this philosophical concept, the moral laws are enforced by the government. These are universal, transcendent moral laws of the Creator God to which all humans are subject. These moral laws are not identified with any particular religion, and no particular denomination is favored or promoted. To the contrary, the government is to be zealous in preventing any particular religion from becoming entangled with the government in such a way as to become favored or promoted by the government. In addition, the government is to recognize and honor its responsibility to secure and protect the freedom of worship of all individuals of all religions. Likewise, it respects the

right of individuals to be free from any religion. The unalienable right of every person to believe as he or she desires is to be secured by the government.

The Declaration of Independence and the Constitution are the documents which created this nation and organized its governance. The Declaration recognized and honored the "Laws of Nature and of Nature's God," set forth "truths" that are self-evident, declared that all men are endowed by their Creator with certain unalienable rights and then set forth that the purpose of governments is to secure those unalienable rights. The Constitution including the Bill of Rights then implemented these principles. The Declaration of Independence was the promise. The Constitution is its fulfillment.

The Declaration of Independence reflected a vision of a government for our nation that would secure the unalienable rights with which all people are endowed by their Creator. That was certainly the understanding of those involved in drafting the Constitution. They lived by the statement in the Declaration that if the government fails to secure our rights, then the people have the right to alter or abolish that government. Article VI of the Constitution requires all officeholders to "support the Constitution." This mandate implicitly requires that they interpret the Constitution in the light of the principles of the Declaration of Independence. To do otherwise destroys the form of government established by the Declaration and the Constitution. The provision of Article VI of the Constitution requiring every officeholder to take an oath or affirmation is a requirement that officeholders must, in effect, recognize a Higher Power who is able to pass on or judge his or her fulfillment of the obligations assumed under their oath

or affirmation. The Declaration identified that Higher Power.

Both the Declaration and the Constitution must be considered by the Courts of the United States of America. The Court has a duty to recognize the philosophy embodied in those organic laws: the philosophy of theism.

This philosophical foundation for our government set by the Founding Fathers is found in the legislative history of the statute adding "under God" to the Pledge of Allegiance, found in the *Congressional Record*:

> At this moment of our history the principles underlying our American Government and the American way of life are under attack by a system whose philosophy is at direct odds with our own. Our American Government is founded on the concept of the individuality and the dignity of the human being. Underlying this concept is the belief that the human person is important because he was created by God and endowed by Him with certain inalienable rights which no civil authority may usurp. The inclusion of God in our pledge, therefore, would further acknowledge the dependence of our people and our Government upon the moral directions of the Creator. At the same time it would serve to deny the atheistic and materialistic concepts of communism with its attendant subservience of the individual.

H.R. Rep. No. 83-1693, at 1-2 (1954), *reprinted in* U.S.C.C.A.N. 2339, 2340.

The governmental philosophies referred to this excerpt from the Congressional Record are atheism and theism. The philosophy of a Communist government is

militant atheism, that is, the mandatory belief that there is no God. The philosophy of our republican form of government is theism – the recognizing of the existence of God and the moral laws of God. These philosophies are at direct odds with each other.

D. Neither theism nor atheism is a religion.

Judge Goodwin stated in his opinion for the majority of the panel, making reference to *Alleghney County v. A.C.L.U.*, 492 U.S. 573 (1989) and *Lynch v. Donnell*, 465 U.S. 668 (1984):

> In *Allegheny*, the Court noted that it had 'considered in dicta the motto and the pledge, characterizing them as consistent with the proposition that government may not communicate an endorsement of religious belief.' And in *Lynch*, the Court observed that students recited the pledge daily, but only to support its point that there is a long tradition of 'official acknowledgment of religion' . . . yet, it does not follow that schools may coerce impressionable young children to recite it, or even to stand mute while it is being recited by their classmates . . . The Pledge differs from the Declaration and the anthem in that its reference to God, in textual and historical context, is not merely a reflection of the author's profession of faith. It is, by design an affirmation by the person reciting it. To pledge allegiance to something is to alter one's moral relationship to it, and not merely to repeat the words of an historical document or anthem. *Newdow,* 328 F.3d at 490.

This is simply wrong. The philosophy of theism, in and of itself, is not a religion. A person can accept the philosophy of theism and not accept any religion. A government

can be established with a philosophy of theism without entangling itself with a religion or even recognizing a religion.

Atheism, as is acknowledged by the panel, is not a religion. The Court of Appeals is in error assuming that theism cannot be endorsed by the government. These are two conflicting philosophies, and the Founding Fathers of our nation had to make a choice between them. The panel is referring to two philosophies – the philosophy of theism and the philosophy of atheism – not to a religion and to a philosophy. The panel erroneously held that the philosophy of the government of the United States of America is *agnosticism*.

No two of these governmental philosophies we describe above can be assigned to a government at the same time. A government simply cannot profess two of these philosophies at the same time. A determination must be made as to which one of these philosophies is set forth in the organic laws of this nation – the Declaration and the Constitution.

The Establishment Clause and other provisions of the Constitution refers to "religion," not a governmental philosophy. The Establishment Clause deals with "religion" – a particular religious denomination – not with the philosophy of the government which had already been announced by the Declaration of Independence. The Establishment Clause simply addresses a concept that is inherent in the philosophy set forth in the Declaration of Independence; to-wit, the government is not to endorse, promote, or advance a particular religion. The philosophy of atheism had been rejected upon the adoption of the Declaration. The Declaration embodies the philosophy of

theism and it does not mention any particular religion. The existence of God and His moral laws was to be acknowledged and honored by the government, but *no* religion was to be acknowledged or honored. Inherent in the philosophy set forth in the Declaration is the concept that the officeholders of the United States of America are to do exactly what the panel states the Establishment Clause prevents them from doing, that is, to "support the existence and moral authority of God."

E. The executive, legislative and judicial branches of the government have confirmed, on many occasions, that the philosophy of the government of the United States of America is theistic in nature.

Illustrative of the action taken by the executive branch of the government are the statements by President Eisenhower during the signing ceremony of the statute inserting the phrase "under God" in the Pledge and the Proclamation of President George W. Bush proclaiming Sunday, January 20, 2002 as National Sanctity of Human Life Day.

President Eisenhower stated: "From this day forward, the millions of our school children will daily proclaim in every city and town, every village and rural schoolhouse, the dedication of our nation and our people to the Almighty." 100 Cong. Rec. 8618 (1954).

President George W. Bush in that proclamation stated:

> This Nation was founded upon the belief that every human being is endowed by our Creator with certain "unalienable rights." Chief among them is the right to life itself. The Signers of the Declaration of Independence pledged their own lives, fortunes, and honor to guarantee inalienable rights for all of the new country's citizens. These visionaries recognized that an essential human dignity attached to all persons by virtue of their very existence and not just to the strong, the independent, or the healthy. That value should apply to every American, including the elderly and the unprotected, the weak and the infirm, and even to the unwanted.

Thomas Jefferson wrote that, "[t]he care of human life and happiness and not their destruction is the first and only legitimate object of good government." President Jefferson was right. Life in an inalienable right, understood as given to each of us by our Creator.

Congress has confirmed in many ways that the Declaration of Independence must be considered when determining the philosophy of our government.

The original thirteen states had been parties to the adoption of both the Declaration and the Constitution. To those states, there was clearly an essential connection between those two documents. Congressional ordinances admitting states into the Union prior to 1864 provided that they were being admitted with the same rights and subject to the same conditions as the original thirteen states. Beginning in 1864, every state admitted to the Union has been admitted under specific legislation which provides, in essence, that the Constitution of the state "shall be republican, and not repugnant to the Constitution of the United States, and the principles of the Declaration of Independence." This provision appears in legislation admitting the states of Alaska, Arizona, Colorado, Hawaii, Montana, Nebraska, Nevada, New Mexico,

North Dakota, South Dakota, and Washington. In this way, relationship between the Declaration and the Constitution has been specifically recognized and honored by Congress, most recently in 1958 (Alaska) and 1959 (Hawaii).

The Preface to the United States Code, approved by Congress, constituting "the official restatement in convenient form of the general permanent laws of the United States in force December 7, 1925 . . . " contains the Declaration of Independence along with the Constitution. Both are identified as being a part of the organic laws of the government of the United States of America.

This concept is expressed in a very simple but profound way by Justice Douglas of the United States Supreme Court in his dissenting opinion in the case of *McGowan v. Maryland*, 366 U.S. 420, 563 (1961):

> The institutions of our society are founded on the belief that there is an authority higher than the authority of the State; that there is a moral law which the State is powerless to alter; that the individual possesses rights, conferred by the Creator, which government must respect. The Declaration stated the now familiar theme: "We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness." And the body of the Constitution as well as the Bill of Rights enshrined those principles.

F. There is a difference between recognizing a God and recognizing a religion.

There are two erroneous concepts which came into play in this decision of the Court of Appeals. They are:

1. Many of our leaders, including members of the judiciary, when considering the language of the First Amendment to the Constitution, have made no distinction between the obligation and duties of a member of the society and the obligation and duties of an officeholder in the government. Government officials take an oath to perform in accordance with the documents that created the nation and established its governance which inherently include the philosophy of theism. Their obligation is to look to those documents for guidance and instruction in the performance of their official duties. On the other hand, members of the society have no such duties or obligations. They are free to exercise their unalienable rights, including the right to practice their own religion, or no religion, or atheism, which freedom is to be secured and protected by their government. Recognition of this distinction by the officeholders in the government is essential for the proper performance of their official duties. Officeholders in the government must be guided and directed by the documents creating the nation and organizing the powers of its government. This is not true of non-officeholders. Nor is it true of the officeholders in their personal lives.

2. Many of our leaders, including many members of the judiciary, have made no distinction between the recognition and honoring of the Creator God, on the one hand, and the recognition and honoring of a religion, on the other hand. The effect of this is that many of our leaders, including some members of the judiciary, have

taken the position that the First Amendment prohibits the government from asserting any concept that is religious in nature. This means that, since all transcendent truths and principles are religious in nature, in that they are transcendent, our government must be content neutral as to what is right, and what is wrong, what is good, and what is evil. Quite frankly, anyone who will look to the Declaration of Independence as well as the Constitution cannot reach that conclusion. It might be possible for someone to reach this erroneous conclusion if only the Constitution is considered, but it is simply not possible when the Declaration of Independence is also considered. The Declaration of Independence makes a distinction between the recognition of God, the Creator, the Supreme Judge of the World, and divine Providence, on the one hand, and a religion on the other hand. The word "religion" refers to a particular religion not to every philosophy that deals with the subject of God and His moral laws or to truths and morals that are religious in nature. All transcendent truths and morals are religious in nature since their source is God.

This distinction must be accepted by everyone, including the members of every particular religion. The documents establishing this nation and its government make this distinction. It may be that the members of a particular religion believe that the recognition of the Creator God presents an incomplete picture of God. Nonetheless, the Founding Fathers of the nation made that decision and established a nation with a government based on the concept of theism – not based on a particular religion. The officeholders in the government are to accept that concept, which is not a religious test. This oath or affirmation is required by Article VI of the Constitution in order to be "Qualified to any Office or public Trust under the United

States." The fact that there is a distinction between recognizing and honoring the Creator God, as set forth in the Declaration of Independence on the one hand, and a particular religion, on the other hand, must be acknowledged and honored by all officeholders in the government, including the members of the judiciary.

CONCLUSION

America must choose between a governmental philosophy of agnosticism and a governmental philosophy of theism. America cannot choose both. In order for the philosophy of agnosticism to be chosen, the Declaration of Independence and all of the Constitution, except the First Amendment, must be ignored completely. This is apparently the course that the United States Court of Appeals for the Ninth Circuit is following. If the Declaration of Independence and the Constitution, all of the Constitution, are considered, then the choice is obvious. Our Founding Fathers unequivocally approved of those two documents which established a government for the United States of America which sets forth clearly and without question the philosophy of theism – *our government is to recognize and honor the existence and moral laws of God.* This is clearly articulated in the Declaration of Independence and implemented by the Constitution.

If, as a matter of fact, America has a government with a foundation consisting of the wisdom of man, agnosticism, instead of a foundation consisting of the principles set forth in the Declaration and implemented by the Constitution, then the government cannot recognize or honor any

permanent, moral truths or principles. It has no guidelines or directions to follow. Chaos is our future.

America should be proud and thankful that our Founding Fathers established a nation with a foundation that requires the government to recognize and honor the principles set forth in the Declaration of Independence and implemented by the Constitution – a foundation that was intended to be permanent – a theistic government with permanent principles that came from God and cannot be changed by humans. This is the fundamental philosophy of the United States government and must be recognized by the officeholders of the government, including the members of the judicial branch.

Respectfully submitted,

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